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IN THE

Supreme Court of the United States

October Term, 1964

No. 165

CHARLES ROSENTHAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

CHARLES ROSENTHAL,
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PETITION FOR REHEARING

Petitioner pro se hereby applies for rehearing of the Order of this Court, dated October 12, 1964, denying his petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit, which affirmed his conviction and sentence for conspiring * to violate the securities laws and to defraud the United States by impeding the functions of the Securities and Exchange Commission, and for the illegal sale of unregistered securities. **

Reasons for Granting Rehearing

Whether the government failed to establish the single conspiracy charged insofar as the evidence viewed in a light most favorable to the prosecution, established a con-

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* 18 U. S. C. § 371.

** 15 U. S. C. § 77e(a)(1), 77X and 18 U. S. C. § 2.

spiracy between some defendants fraudulently and by criminal means to create and acquire a large block of control stock in the "United Dye" Company, and a later, separate conspiracy with the broker-defendants, including appellant, of a very definite outline, namely, to sell such stock to the public and to stabilize the price of such stock through such sale.

The eleven-month trial established two separate and distinct conspiracies rather than the single conspiracy charged. Enormous prejudice to petitioner resulted from such variance.

In addition, by far the greater part of the evidence and time consumed in the trial concerned matters both immaterial and prejudicial to petitioner's case.

I respectfully refer this Court to the statement of the evidence in the opinion of the Court below and my petition for certiorari (pp. 5-6) in this regard.

The Government Failed to Prove the Existence of the Single Conspiracy Charged in Count One. Appellant Was Thereby Severely Prejudiced

Assuming *arguendo* the sufficiency of the evidence, and viewing it in a light most favorable to the government, the proof established two separate and distinct conspiracies.

The evidence against petitioner, at most, shows that he embarked upon a criminal venture of very definite limits. He was concerned, at most, with the illegal sale of unregistered control stock and market manipulation (G. Br. 81-2, 84-7).* The government sought to establish the illegality of the stock sales by attempting to show that pe-

* References to the government brief herein referred to relate to the government brief in the Circuit Court.

titioner made the sales with knowledge that the stock was "control stock. Market manipulation, illegal in any event (15 U. S. C. 78i), was asserted by the government to have been an incident of the stock distribution (G. Br. 29, 104-118).

Most of the government's evidence, however, was concerned with a different conspiracy among some of the defendants (not the broker defendants of whom petitioner was one) fraudulently to create and distribute among themselves, half a million shares of United Dye stock (G. Br. 32-76). Most of the trial, just as most of the statement of facts in the government's brief, concerns Guterma's intricate and fraudulent machinations to obtain the stock for relatively worthless consideration—in other words, to steal the stock from United Dye (G. Br. 37-76). The proof went even beyond that and showed that Guterma looted the Bon Ami Company as well (G. Br. 64-71).

The government did not attempt to establish (for it could not) that petitioner took any part in those crimes or that he had any stake in them. Moreover, the government evidence itself establishes petitioner's lack of complicity in those crimes. Thus, the government evidence is that "Guterma orally informed petitioner that [the control] shares were obtained by the means of the merger between United Dye and Handridge" (G. Br. 175). Since Guterma found it necessary to tell this to petitioner, after the fact, it shows conclusively that petitioner had no part in that fraudulent merger *.

Since the government concedes that petitioner's first participation in the alleged conspiracy came after the Handridge-United Dye merger and the commission of the

* The record also shows that knowledge of the fraudulent and criminal character of the Handridge transaction is not attributable to petitioner. However, petitioner's lack of such knowledge is not necessary for a showing that two separate and distinct conspiracies were established.

crimes related to that transaction, the government's theory of liability with respect to petitioner would seem to be that he joined the existent Guterma conspiracy in order to effectuate what the government characterizes as the last "phase" of the conspiracy, viz. to illegally sell the half-million United Dye shares to the public. The connection, however, is no more than purely verbal. It is perfectly plain that after stealing the United Dye stock the Guterma group could have retained it or could have sold it without adding new crimes in selling the stock. And, had the Guterma group acquired the control stock of United Dye by means perfectly legal and legitimate, such fact would in no way bear upon, or be relevant to, petitioner's conviction of the crimes with which he was charged—the sale of unregistered control stock, a related endeavor to stabilize the price of such stock, and conspiracy to do those things. Similarly, and for the same reasons, the criminal means by which the Guterma group obtained such stock is equally irrelevant to the case against petitioner—as irrelevant as would be evidence that the stock was acquired through a bank robbery or any other crime. The government has not argued to the contrary.

The means by which the government would seek to link Rosenthal with the Guterma group conspiracy to fraudulently create and acquire the United Dye shares, are either totally ineffectual for that purpose or make plain petitioner's lack of complicity.

The government offers that Guterma orally advised Rosenthal that the control stock was obtained by means of the Handridge merger (*supra*, p. 3). Apparently the government would suggest that this evidence is in some way relevant to the question whether the government failed to establish the existence of a single conspiracy.

What bearing such evidence has is difficult to conceive.* It is plain that the manner in which the shares were acquired by the control group is not relevant to the government's case against Rosenthal (*supra*, p. 4).

It was suggested that the circumstances surrounding the merger were relevant to counter a possible defense that the sales were legal because Rule 133** exempts mergers. If "merger" were in fact a defense, a fraudulent merger would remain just as much a defense, particularly if petitioner and the other broker defendants knew nothing about that fraud. However, Rule 133 only exempts from registration requirements the original transfer of shares to the shareholders of a merged corporation. It in no way exempts a subsequent sale of unregistered stock by those shareholders if they are control persons or are members of a control group. *United States* v. *Crosby*, 294 F. 2d 928 (2d Cir., 1961); *S.E.C.* v. *Culpepper*, 270 F. 2d 241, 247-8 (2d Cir., 1959). The government recognizes this (G. Br. *e.g.*, 79, 83, 178).

Prior to the decision in these cases there may have been some uncertainty about its application. However, the principal defendants cannot claim to have acted in good faith. If the government evidence be credited, they furnished the brokers with letters denying that the stock was control stock (the letters did not rely on Rule 133). They also utilized nominees so that the control character of the stock would not be readily apparent (G. Br. 81-84). Clearly, if defendants entertained the notion that the acquisition of the stock by means of a merger made it "exempt" even

* It should be noted that Guterma testified only that he told Rosenthal of the fact of the merger—not any details concerning it or its fraudulent character. Of course, as chief swindler and executive of the control group, seeking to obtain a selling force for his stock, he would hardly volunteer to the brokers information concerning his unrelated crimes perpetrated upon the United Dye Corporation.

** 17 C. F. R. 230.133.

though control stock, they would not have gone to such lengths to conceal its control character.

Of course, the fact of Guterma's advising petitioner of the merger establishes beyond peradventure that petitioner was not in any way implicated in that crime, for, it shows that it was necessary for him to be informed of the very fact of the merger.

The government also argues that the evidence shows a single "conspiracy involving a progressive series of interrelated transactions" common to narcotics "chain" conspiracies (G. Br. 174). The government cites *United States v. Agueci*, 310 F. 2d 817 (2d Cir., 1962), cert. denied 372 U. S. 959 (1963). It concedes, as it must, that the *Agueci* case involved a typical narcotics "chain" conspiracy and the ordinary functional division of labor common to the illegal importation and sale of narcotics. Of course, the *Agueci* case, as all narcotics conspiracy cases, was a prosecution under the narcotics conspiracy statute (21 U. S. C. 174) which requires as a necessary element for the conviction of conspiracy to sell narcotics, knowledge that the narcotics were illegally imported. Naturally, a prosecution, as this one, for conspiracy to sell unregistered securities, does not deal with contraband and knowledge of the means by which the control stock was acquired is not relevant.

The government mistakenly suggests that petitioner bases his attack upon "the assumption that a single conspiracy cannot exist unless each conspirator knew each step of the conspiracy and all other conspirators" (G. Br. 174). It cites two cases dealing with conspiracies of an "indefinite outline" which hold that acts by conspirators in furtherance of such a conspiracy are attributable to co-conspirators ignorant of such acts. It has already been shown (*supra*, pp. 2-4) that Rosenthal's conspiracy, if any, had a definite and limited scope, namely, to sell unregistered control stock (however acquired) and to stabilize the

price of that stock.' Consequently, the government's contentions are not relevant.

In fact, *Crosby* and *Andolschek*, although relied upon by the government, bear out petitioner's position. In *Andolschek* (142 F. 2d 503), the evidence showed that the acts of co-conspirators sought to be attributed to the defendant were in furtherance of the "common purposes" of the conspiracy as he understood them. Judge Learned Hand expressly limited the scope of that decision. Thus (at p. 507) he warned:

> "It is true that at times courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter, *or may have entered*, with third persons. That is of course an error: *the scope of the agreement actually made always measures the conspiracy*, and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime." (Emphasis added.)

Learned Hand, speaking for the Court below, many times articulated the rule which makes plain the government's failure to prove a single conspiracy, as charged, in this case.

In *United States* v. *Peoni*, 100 F. 2d 401, 403 (2d Cir., 1938) he stated the rule thusly:

> "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it * * *."

In *United States* v. *Falcone*, 109 F. 2d 579, 581 (2d Cir.) aff'd 311 U. S. 205 (1940) he held that for one to join in the conspiracy of others:

> "* * * he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within

> the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all-comprehensive indictments that they can be avoided."

How completely apposite to this case are Judge Hand's statements.

United States v. *Crosby*,* 294 F. 2d 928 (2d Cir., 1961) (Gt. Br. 175), similar to this case, involved a prosecution for wire and mail fraud, the sale of unregistered securities, and a conspiracy for those purposes through the acquisition, by fraudulent means, of control of a corporation and the subsequent sale of control stock to the public without registration. This Court reversed the substantive and conspiracy convictions of the broker defendants. It explained the inadequacy of the evidence against the other defendants—the control group—thusly (at p. 945):

> "There was ample evidence here to justify a finding that the *non-broker defendants* were a part of an overall scheme to acquire and exploit a public corporation for the ultimate purpose of selling to the public unregistered common stock." (Emphasis added.)

Thus insofar as the *Crosby* case is analogous to this one, this Court there merely recognized what should be obvious—that Guterma and the other non-broker defendants may have entered into a single conspiracy to violate more than one federal law by fraudulently acquiring control stock of United Dye and later distributing that stock without registration.

It has been shown (*supra*, pp. 2-5) that the government has offered no more to connect petitioner with that Guterma

* In *Crosby*, eight defendants went to the jury on a fifty-Count indictment charging conspiracy and violation of the S.E.C. laws. The "protracted jury trial" took fifteen weeks.

conspiracy than Guterma's testimony that he told petitioner that the control stock had been obtained by the means of a merger.

No matter how the government's proof is viewed, Rosenthal can only be charged with having embarked upon a criminal venture of a very definite outline—to sell, for a price, unregistered common stock, however acquired by the control group, and to participate in an effort to stabilize the price of that stock on the Stock Exchange. The government has proved, assuming the adequacy of its evidence, a separate "control group conspiracy" much broader in its purposes and differing in illegality.

The prejudice to petitioner by the government's proof of a second unconnected conspiracy could not be more plain. The greatest part of the eleven month trial involved the intricate and fraudulent machinations of the Guterma "master-mind" group in acquiring United Dye stock and in looting United Dye and Chemical Corporation and the Bon Ami Company of millions of dollars (G. Br. 32-76). The prosecutor himself stated in oral argument that the brokers could have been tried in four days. It would be absurd to argue that to subject petitioner to an eleven month trial, instead, is not prejudicial. *Kotteakos* v. *United States*, 328 U. S. 750, 756 (1946).

Petitioner's conviction under Count One must be reversed and the Count dismissed for inadequacy of proof. His conviction under the substantive Counts must be reversed because of the prejudice to him resulting from the mass of evidence presented to the jury under the all-inclusive conspiracy Count, charged, but not proved, by the government.

CONCLUSION

For the reasons set forth above, this Court should grant rehearing.

Respectfully submitted,

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Certificate of Good Faith

I, being the petitioner *pro se*, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

CHARLES ROSENTHAL,

Dated: December 4, 1964.